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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 564

TENNECO, INC.

versus

GREATER LAFOURCHE PORT COMMISSION

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF STANLEY L. PERRY
P. O. Box 236
Galliano, Louisiana 70354
ROBERT STAMPS
221 Carondelet Street
New Orleans, Louisiana
ATTORNEYS FOR
PETITIONER

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Greater Lafourche Port Commission, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above and entitled case on June 1, 1970.

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, in *Tenneco, Inc. v. Greater Lafourche Port Commission*, printed in Appendix "A" is reported at 293 Federal Supp. 1019 (1968).

The opinion of the United States Court of Appeals

for the Fifth Circuit in *Tenneco, Inc. v. Greater Lafourche Port Commission*, printed in Appendix "B" is as yet unreported. The decision was rendered in June 1970.

The petition for Rehearing was denied.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to Title 28, Section 1254 (1), United States Code.

ISSUE PRESENTED

The primary issue presented in this cause concerns the authority of a State agency to regulate the installation and relocation of pipelines across the waterways of the State of Louisiana with the primary emphasis on requirements of navigation.

STATEMENT OF THE CASE

There is no real dispute concerning the facts of this case.

In 1955, Tenneco secured permits from the United States Corps of Engineers and the Louisiana Department of Public Works to run a pipeline across Bayou Lafourche (Belle Pass) in Lafourche Parish, Louisiana. The pipeline was laid in keeping with the provisions of the permits and the plans and specifications submitted by Tenneco to these regulatory agencies.

The Greater Lafourche Port Commission was created by Act No. 222, 1960 General Session, Louisiana Revised Statutes 34:1651 et seq. In November, 1963, the Commission undertook to construct a Port terminal at Belle

Pass, Lafourche Parish, Louisiana. The facilities were constructed with funds received from a local bond election, with funds from various State agencies and with more than a million dollars contributed by the United States Government. The initial phase of construction called for the deepening and widening of Belle Pass. Engineering plans were approved by the United States Corps of Engineers, the Louisiana Department of Public Works, and HUD, that agency of the Federal Government which supervised the construction program.

Bayou Lafourche (Belle Pass) is a major outlet to the Gulf of Mexico. The plans did not provide for the dredging of a new channel but called for the existing channel to be deepened and widened. In order to accommodate the dredging operation, it was necessary that the Tenneco pipeline be lowered. The Port Commission called on Tenneco to undertake the lowering of its pipeline, which it did. Before doing so, the Port Commission adopted a resolution which assured Tenneco that in lowering the pipeline, solely at its own expense, it would not prejudice any rights which it may have to recoup some of the expense from the Port Commission as the law may later determine.

Thereafter, Tenneco, called on the Port Commission to pay $35,208.74, allegedly the cost of lowering the pipeline in that area which was outside of the original bayou lines. The Port declined payment. This suit resulted.

DECISION OF THE DISTRICT COURT

The district court rendered judgment in favor of the Greater Lafourche Port Commission, denying Tenneco's claim for reimbursement costs allocated to the relocation of the pipeline in that area which was outside of the

existing channel. The district court's decision is attached hereto and identified as Appendix "A".

DECISION OF THE FIFTH CIRCUIT

The United States Fifth Circuit Court of Appeals reversed the decision of the District Court and held that the condition attached to the Department of Public Works permit did not require that Tenneco pay for alterations occasioned by the state's encroachment on an adjacent easement that Tenneco had purchased from a private party. That decision is attached hereto and identified as Appendix "B". The Fifth Circuit concluded that a proper construction of the Public Works permit limits its effect to the area within the right of way granted, and thus the Court did not consider either the constitutional issue of expropriation without just compensation or the issue concerning the authority of Public Works to issue the permit. Nor did the Court rule on the issue of whether or not the conditions of the permits inured to the benefit of the Port Commission.

Petitioner respectfully contends that the Fifth Circuit fell into error in giving such a narrow and limited interpretation to the clause of the Public Works permit. The permit recites that the permittee (Tenneco) had to bear the costs of pipeline alterations resulting "should changes in the locations or sections of the existing channel, or in the generally prevailing conditions in the vicinity, be required in the future" etc. There are limited possible occurrences to as existing channel. The channel can be filled-in; it can be narrowed; it can be deepened; or, it can be widened. If the Public Works condition is to be given any effect whatsoever, then clearly it should encompass the project of the Port Commission, which called for the deepening and widening of the existing channel.

REASONS FOR GRANTING WRIT

The limited and narrow construction of the Public Works permit by the Fifth Circuit simply avoided the real issues of this lawsuit. Those issues are set out as follows:

1. What is the jurisdiction or authority of the United States Corps of Engineers, the Louisiana Department of Public Works and the Greater Lafourche Port Commission over the area of Bayou Lafourche in question; and, does the United States Corps of Engineers and the Louisiana Department of Public Works have authority to grant the permits in question?

I. Jurisdiction of the United States

Tenneco does not question the jurisdiction of the Corps of Engineers to grant the permit in this case. Actually the Corps has exercised jurisdiction over Bayou Lafourche (Belle Pass) for many years. At present, by Act of Congress, the Corps has the responsibility of maintaining Belle Pass at a minimum depth of 12 feet and minimum width of 125 feet, although the Greater Lafourche Port Commission, as a result of this dredging project, has deepened and widened the channel beyond the limits maintained by the Corps.

The Federal government has paramount jurisdiction for the regulation of navigable waterways and permits must be acquired from the Corps of Engineers before attempting to cross the right of way. *(Section 10-Rivers and Harbors Act-33 U.S.C.A. Sec. 403)*

2. Jurisdiction of the Louisiana Department of Public Works.

There is authority to the effect that the Department of Public Works of the State of Louisiana has concurrent jurisdiction with the United States Corps of Engineers over the waterways of the State. *Louisiana Revised Statutes, Title 38, Section 3*, states the following:

> "The Department of Public Works shall plan systems of inland waterways, navigation drainage, irrigation and water conservation projects foster the maintenance, improvement, and extension of the intracoastal Canal System and its feeders; and initiate, sponsor, and carry through to completion all waterway projects which will further develop and expand the water resources of Louisiana, whether the projects are under the Flood Control Act or any other federal agency."
>
> "Nothing in this Section shall be construed as interfering with the jurisdiction of the United States government over navigable waters in Louisiana or as abridging, impairing, or altering the rights, obligations, and authority of the United States, the Secretary of the Army, Chief of Engineers, or any commission, board, or officer of the United States conferred or provided by any Act of Congress in respect to the execution, maintenance, or control of any plan, project, or program of flood control, navigation, or the use and improvement of navigable streams and waters, or in respect to any of the matters or things referred to in this Section."

This statutory authority indicates that the Louisiana Department of Public Works has legal jurisdiction to regulate navigable waterways, including Bayou Lafourche

as long as the Department does not interfere with the primary jurisdiction of United States government. We submit that if the Department has the legal authority to plan systems of inland waterways, as stated in the statute, then obviously it also has the authority to take steps to prevent obstruction to navigation in these waterways. Clearly a pipeline crossing a waterway would amount to an obstruction of that waterway if it were not laid at the proper depth and under acceptable plans and specifications. Therefore, the Department had a clear legal right to grant the permit which was granted in this instance.

3. Jurisdiction of the Greater Lafourche Port Commission.

The Greater Lafourche Port Commission was created by legislative act as set forth in Louisiana Revised Statutes, Title 34, Sections 1651 et seq. Section 1652 sets forth the jurisdictional area and powers of the Port.

Section 1652:

> "The Commission shall exercise the powers herein conferred upon it within the port area, consisting of the entire tenth ward of the Parish of Lafourche as the boundaries and limits of said ward are presently fixed by law.
>
> The commission shall regulate the commerce and traffic within the port area in such manners as may, in its judgment, be for the best interest of the state. It shall have charge of and administer public wharves, docks, sheds and landings and shall be empowered to construct or acquire and equip wharves and landings and other structures useful for the commerce of the port

area and to provide mechanical facilities therefor; to erect sheds or other structures on such wharves and landings; to maintain proper depths of water at all such wharves and landings; to provide light, water, police protection and other services for its facilities as it may deem advisable; to construct or acquire, maintain and operate basins, locks, canals, warehouses, and elevators; to charge for the use of all facilities administered by it and for all services rendered by it, such fees, rates, tariffs or other charges as it may establish; to establish harbor lines within the port area by agreement with the United States Corps of Engineers; and to construct, own, operate, and maintain terminal rail facilities and other common carrier rail facilities for the purpose of rendering rail transportation to and from the facilities to be erected, owned and operated by the commission in ~~both intrastate and~~ interstate commerce. The legislature may confer additional powers upon the commission, not inconsistent with the provisions hereof; provided, however, that it shall not impair any contract lawfully entered into by the commission. Title to all property and improvements thereon operated by the commission shall vest in the Port Commission."

Bayou Lafourche (Belle Pass) is the major navigational outlet from the port area to the Gulf of Mexico. It is in this area that the port terminal has been constructed, and it is in this area that Tenneco's pipeline had to be relocated to accommodate dredging operations. At the present, as a result of the port dredging, Belle Pass has a minimum depth of 20 feet and a minimum bottom width of 250 feet. The dredging project has to be and was approved by the Corps of Engineers and the Department of Public Works.

Since Tenneco has challenged the legal authority of the Louisiana Department of Public Works to regulate the installation of pipelines in navigable waterways, we anticipate that Tenneco would also challenge similar authority of a port commission.

It is our contention that the Greater Lafourche Port Commission has jurisdiction concurrent with that of the Louisiana Department of Public Works, but subservient, of course, to the United States Government. If the port has the legal authority to "maintain proper depths of water at all such wharves and landings, to construct or acquire, maintain and operate basins, locks, canals, etc., and to regulate the commerce and traffic within the port area," then undoubtedly the port should also have the authority to prevent any obstruction to navigation in these waterways. The port should have the legal power to prevent installation of structures which could be a hazard to navigation, such as a pipeline improperly installed.

II. Can the stipulations of the permits issued by the U.S. Corps of Engineers and the Louisiana Department of Public Works inure to the benefit of the Greater Lafourche Port Commission?

1. Permit granted by the Department of Public Works.

The Greater Lafourche Port Commission was not in existence when this permit was granted to Tenneco by the Department of Public Works. However, it is our contention that the restrictive provisions of this permit would inure to the benefit of all other regulatory public agencies.

This is a stipulation made for the benefit of the public at large and would be applicable as long as the proposed changes were reasonable and were made in the public interest. It is not necessary to show any direct contractual relationship with the Department of Public Works. The wording is very general and could inure to the benefit of any regulatory agency, state or federal, in existence then or created at a later date.

Now, in this case, Tennneco has expressly stipulated that the dredging project of the Port Commission, which required relocation of its pipeline, was in fact a project done "in the public interest". Accordingly, that is all that is necessary to permit the Port Commission to become the beneficiary of the restrictive clause in this permit.

However, there is a clear statutory relationship between the Port Commission and the Department of Public Works which can support a judicial determination that the port should be the beneficiary of the restrictive clause in question. There is authority to the effect that the Department of Public Works is an agency of State government serving under the direction of the Executive. The Department is directed to cooperate with various federal agencies, to serve in an advisory capacity to State and local governmental units, and particularly, to help and assist other state executive agencies such as port commissions. Louisiana Revised Statutes 34:1652 expressly states that the Greater Lafourche Port Commission may, upon terms and conditions mutually agreeable, utilize the services of the other executive departments of the State. We respectfully direct the Court's attention to the following additional authorities:

> "The Department of Public Works may also cooperate with the federal government or any

federal agency, and may receive and expend grants of money by the federal government or any federal agency for the purpose, upon any terms and conditions prescribed by the Congress or any agency of the federal government under authority of the Congress, and to this end may contract for the acceptance of any grant of money upon the terms and conditions, including any requirement of matching the grants in whole or part, which may be necessary." *(Louisiana Revised Statutes Title 38, Section 5.)*

"For the purpose of providing planning assistance to municipal, parish, regional and other planning agencies of the State of Louisiana in the solution of their planning problems, the Department of Public Works, State of Louisiana, be and is authorized to apply for and accept grants of money from the government of the United States or any federal agencies in connection with such assistance and, to this end, the said department may contract with the United States or such federal agencies for the acceptance of such grants including any requirement for matching said grants in whole or in part." *(Louisiana Revised Statutes Title 38, Section 5.1.)*

"The Department of Public Works may also co-operate with any drainage or subdrainage district, or any levee board, or any political subdivision, now or hereafter organized in accordance with law, upon any terms and conditions prescribed by the Department of Public Works." *(Louisiana Revised Statutes Title 38, Section 6)*

Actually, in the organization and development of the port terminal, the Port Commission has on many occasions called on officials of the Department of Public

Works, in keeping with the above statutes, and has received valuable assistance and cooperation. The Department was also cooperative in the preparation of the application for the federal matching grant and the procurement thereof. The Department has also, at the request of the Port Commission, worked closely with officials of the Corps of Engineers and helped secure Corps approval of the port dredging project.

2. Permit granted by the United States Corps of Engineers.

Tenneco was granted a permit by the Corps of Engineers to run this pipeline across Belle Pass. That permit also contained a restrictive clause concerning future alterations which reads as follows:

> "That if future operations by the United States require an alteration in the position of the structure or work herein authorized . . . the owner will be required . . . to remove or alter the structural work . . . without expense to the United States . . . No claim shall be made against the United States on account of any such removal or alteration."

While it may be argued that the Port project was not undertaken directly by the Corps of Engineers, nevertheless, the dredging phase of this project was under direct supervision and control of the Corps and received Corps' approval. However, the dredging of Belle Pass was only a small portion of the terminal project. The overall project cost approximately five million dollars. The record will show that this project was constructed with the assistance of substantial Federal aid, approximately one and one-half million dollars. Furthermore,

the record will show that every phase of this project had to be approved by HUD, the federal agency in charge of administering this grant to the Port Commission. The plans and specifications of each phase had to receive Federal approval. Construction contracts and payments received Federal approval.

Therefore, it is our contention that this project was "an operation of the United States" and accordingly, the Port Commission should be a beneficiary of those restrictive conditions in that permit granted by the Corps of Engineers to Tenneco, quoted above.

III. The real issue of the litigation concerns an interpretation of the restrictive clause in the permits and a fact determination as to whether or not the dredging project of the Port Commission was such a project that would properly be covered by the restrictive clause.

Now, if this litigation involved the dredging of an entirely new channel, there is no question but that Tenneco could not be forced to bear the costs of a relocation or lowering of the line. But the Port Commission did not dredge a new channel. On the contrary, the project called for the deepening and widening of the existing channel. When Tenneco laid its pipeline, it was laid across an existing channel. Tenneco secured permits from various regulatory agencies to run its line across the existing channel.

Such restrictive clauses are clearly not arbitrary or unreasonable. Is it arbitrary or unreasonable for a public agency to protect the public interest insofar as future navigational needs are concerned? We hardly think so.

On the contrary, we submit that in this instance the regulatory agencies not only have a right to impose permit restrictions concerning futures navigational improvements, as in this case, but these agencies have a firm duty and obligation to protect the public interest.

These permits were issued solely for the accommodation of Tennessee Gas. When issued, the regulatory agencies anticipated a future need to deepen and widen Bayou Lafourche. They included in the permits the restrictive clause in question. The wording of the clause clearly encompasses the project which the Port Commission undertook, i.e., the deepening and widening of the channel. The restrictive clause was an agreement between Tenneco and the regulatory agencies involved. The clause was a condition upon which the permit was granted and accepted by Tenneco.

Actually, these restrictive clauses are the only way in which the regulatory agency can take into account the need for future navigational improvements. For instance, if a regulatory agency is presently maintaining a waterway at a depth of 20 feet and width of 100 feet, clearly it could not force a pipeline applicant to install its line at a depth of 50 feet and a width of 300 feet merely to accommodate future navigational needs. To impose such additional costs on the permit applicant would be arbitrary and unreasonable and an abuse of the regulatory power. It is for this reason primarily that the agencies include in the permit a clause identical or similar to the one involved in this litigation.

The terms of the permits or authorizations constitute the law as between the parties in the absence of statutes regulating the conditions on which such permits or authorizations may be granted. The authorization granted

to Tenneco by the Department of Public Works of the State of Louisiana was subject to the condition quoted hereinabove. This condition was quite explicit in its requirement that Tenneco, at its own expense, make such changes as might be required to meet future changes in the location of existing channels or in the generally prevailing conditions, when such changes are undertaken in the public interest. The changes in the channel made in connection with port improvement projects, admittedly inuring to the public interest, fall within the scope of these changes which, under the terms of the authorization, required Tenneco to alter its facilities in conformity therewith at its own expense. Furthermore, there is nothing in that condition to support Tenneco's argument that it is required at its own expense to lower only that portion of the pipeline lying within the channel. A similar contention was raised in *United States v. 597.55 Acres of Land, etc.*, 241 F. Supp. 796 (W.D. La. 1965), a case involving the issue of whether or not the United States was responsible to the holder of a Corps of Engineers' permit for expenses incurred by the permittee-defendant in relocating its pipeline permit on lands adjacent to the waterway, which the pipeline permit was granted, appear to be identical to the conditions imposed upon Tenneco by the Corps of Engineers and not significantly different from the condition imposed by the Department of Public Works. The Court there rejected the permittee's contention that it was entitled to recover the cost of relocating the section of the line lying without the channel.

The Fifth Circuit relied on *Arkansas Louisiana Gas Co. v. Louisiana Department of Highways*, 104 So. 2d 204 (La. App. 1958), but that case can readily be distinguished because it did not involve a previously issued

permit but concerned an attempt to exercise the police power of the State under a statutory provision.

CONCLUSION

Agencies of the State of Louisiana concerned with navigation require a clarification of legal authority in this problem area, and therefore, it is respectfully submitted that a writ of certiorari should issue.

Respectfully submitted,

STANLEY L. PERRY
Attorney at Law
P. O. Box 236
Galliano, Louisiana 70354

ROBERT STAMPS
Attorney at Law
221 Carondelet Street
New Orleans, Louisiana

PROOF OF SERVICE

I, Robert Stamps, Attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Mr. Burt Sperry
SHOTWELL, BROWN & SPERRY
Attorneys at Law
P. O. Box 1591
Monroe, Louisiana 71201

Mr. B. R. Dickerson
UNITED GAS PIPE LINE COMPANY
P. O. Box 1407
Shreveport, Louisiana 71102

Mr. Shirley C. Friend, Jr.
Legal Department
TEXACO, INC.
P. O. Box 60252
New Orleans, Louisiana 70160

By mailing same, postage prepaid, addressed to their respective offices, this 11th day of August, 1970.

ROBERT STAMPS

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

TENNESSEE GAS TRANSMISSION COMPANY,
Plaintiff

V.

GREATER LAFOURCHE PORT COMMISSION,
Defendant

NO. 15892

CIVIL ACTION

SECTION D

MEMORANDUM OPINION

Burt W. Sperry, Esq.
Shotwell & Brown

Attorneys for Plaintiff

Stanley L. Perry, Esq.
Perry & Perry

Attorneys for Defendant

BOYLE, District Judge:

In this diversity action, Tennessee Gas Transmission Company, (hereafter "Tennessee"), a Delaware corporation with its principal office in Texas, seeks a money judgment against the Greater Lafourche Port Commission (hereafter "Commission") on a claim arising out of the lowering by Tennessee of its pipeline which traverses Bayou Lafourche, at what is referred to as Belle Pass in Lafourche Parish, Louisiana, and adjacent lands, some of which were and are owned by Louisiana Land and Exploration Company (hereafter "L. L. & E.").

Beginning in 1955, it was necessary that Tennessee, in order to construct that section of the pipeline involved in

this litigation, secure authorizations from certain governmental entities, both federal and state, as well as a right-of-way through lands owned by L. L. & E.

Consequently, on December 16, 1955, Tennessee purchased from the State of Louisiana, acting through its Governor, a right-of-way over and through land and in streams, gulfs, bays and waterways in various Parishes, including Lafourche Parish, under the jurisdiction, supervision and control of any agencies of the State, for the construction of its pipeline. Then in February 1956, Tennessee sought and procured authorization from the State of Louisiana Department of Public Works to lay the aforementioned pipeline within the bed of Belle Pass. This authorization contained the following paragraph:

> "Should changes in the locations or sections of the existing channels, or in the generally prevailing conditions in the vicinity, be required in the future, in the public interest, the applicant shall make such changes in the project conferred, or in the arrangement thereof, as may be necessary to satisfactorily meet the situation, and shall bear the cost thereof."

Also in February, 1956, Tennessee purchased a "permit" from L. L. & E., granting to it the right to construct its pipeline on and through land belonging to the grantor.

On March 15, 1956, the United States Army Corps of Engineers, having already received notice from the Lafourche Parish Police Jury that that body would interpose no objection to the project, granted Tennessee a permit "authorizing installation and maintenance of a 6-inch gas pipe line under and across Belle Pass (Bayou Lafourche) . . . in Lafourche Parish." This permit was granted subject to several listed conditions, two of which read:

"(d) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee.

"(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized . . . the owner will be required . . . to remove or alter the structural work . . . without expense to the United States . . . . No claim shall be made against the United States on account of any such removal or alteration."

In 1960 by Act of the Louisiana Legislature the Commission was created. Commencing in 1962, the Commission embarked upon an extensive project the object of which was to build a new port facility consisting of, inter alia, docks, warehouses and access roads. The plans for this project required the widening and deepening of Belle Pass including the area where Tennessee's pipeline crossed. The cost of the entire project was to be in excess of $6,000,000, part of which amount was provided by a grant from an agency of the Federal Government and the remaining funds were acquired from various agencies of the State of Louisiana and through a local bond issue. The plaintiff has stipulated that the port improvement project and the widening and deepening of Belle Pass necessitated thereby were undertaken "in the public interest."

In August 1963, the Commission obtained a servitude covering the property belonging to I. L. & E. necessary to completion of the project. However, in granting this servitude in favor of the Commission, I. L. & E. made it subject to the servitude it had granted to Tennessee in 1956. Then in November 1963, the Commission advised Tennessee of its intention to deepen and widen Belle Pass and called upon Tennessee to lower

its pipeline. A dispute arose as to who would bear the expense of lowering that part of the pipeline which lay outside of the channel. Plaintiff concedes that it must bear the expense of lowering that section of the pipeline lying in the channel. Since this dispute threatened to delay the project, the Commission passed a resolution, dated March 10, 1964, authorizing its president to contact Tennessee "and formally request that said company undergo the full expense of said lowering, but expressly reserving to said company, any and all right or rights of re-imbursement from the Greater Lafourche Port Commission, which said company may be entitled to by law . . . ."

Pursuant to this resolution the president of the Commission, by a letter dated March 19, 1964, requested that Tennessee lower the line at its own expense and stated:

> "It is clearly understood and agreed between the Greater Lafourche Port Commission and the Tennessee Gas Pipe Line Company that in lowering said pipeline at its own expense, Tennessee Gas will not in any way prejudice any legal right or rights it may have against the Greater Lafourche Port Commission, for subsequent re-imbursement of any portion of said expense, as the law may later determine."

Sometime thereafter, Tennessee lowered its line and on September 22, 1964 sent the Commission a bill for $35,208.74 representing the cost of lowering that part of the pipeline lying outside of the channel.[4] Upon receipt of the bill, the Commission informed Tennessee that it would pay none of the expense of lowering the line. As a result of that refusal, Tennessee filed this suit.

The Commission having unsuccessfully challenged the jurisdiction of this Court,[5] the case was tried on the merits on a former day and the Court now renders judgment in favor of defendant and against the plaintiff, dismissing this suit at plaintiff's cost.

The facts giving rise to this suit have been fully recited hereinbefore and concerning them there was no real dispute. The outcome of this litigation depends upon the answers to two more or less related inquiries, namely:

Did Tennessee acquire any right to compensation for lowering that portion of its line lying outside the channel by virtue of the resolution of the Commission of March 10, 1964 and the letter of its president to Tennessee dated March 19, 1964?

Did the Commission's requirement that Tennessee lower that part of its line lying within the channel, which necessitated the lowering of a portion of the line lying outside the channel, constitute a "taking" without just compensation to the extent of the expense incurred by Tennessee in lowering the line lying outside the channel?

We answer both questions in the negative.

The plain meaning of the language of the resolution and the letter of the Commission's president make plaintiff's position that the Commission agreed to reimburse it for the costs incurred in lowering the line outside of the channel untenable. The sole purpose of the Commission's action was

to prevent the delay in the dredging operations which would have occurred had Tennessee awaited final determination of its dispute with the Commission before lowering its line. The sole result of the Commission's action was to guarantee to Tennessee that in complying with the request to lower its line it would waive no rights it had or may have to reimbursement from the Commission. The resolution and subsequent letter created no rights, it simply preserved the legal status quo pending a compromise or judicial determination of the dispute.

Plaintiff's contention that the Commission has expropriated its pipeline right-of-way lying outside the channel and is therefore indebted to it for reimbursement is likewise without merit.

The terms of the permits or authorizations constitute the law as between the parties in the absence of statutes regulating the conditions on which such permits or authorizations may be granted. The authorization granted to Tennessee by the Department of Public Works of the State of Louisiana was subject to the condition quoted hereinbefore. This condition was quite explicit in its requirement that Tennessee at its own expense make such changes as might be required to meet future changes in the location of existing channels or in the generally prevailing conditions, when such changes are undertaken in the public interest. The changes in the channel made in connection with the port improvement project, admittedly enuring to the public interest, fall within the scope of those changes which,

under the terms of the authorization, required Tennessee to alter its facilities in conformity therewith at its own expense. Furthermore, there is nothing in that condition to support plaintiff's argument that it is required at its own expense to lower only that portion of the pipeline lying within the channel. A similar contention was raised in United States v. 597.75 Acres of Land, Etc., 241 F. Supp. 796 (W.D. La. 1965), a case involving the issue of whether or not the United States was responsible to the holder of a Corps of Engineer's permit for the expenses incurred by the permittee-defendant in relocating its pipeline on lands adjacent to the waterway which the pipeline crossed. The conditions upon which the pipeline permit was granted appear to be identical to the conditions imposed upon Tennessee by the Corps of Engineers and not significantly different from the condition imposed by the Department of Public Works. The Court there rejected, and we think correctly, the permittee's contention that it was entitled to recover the cost of relocating the section of line lying without the channel in the following language:

> "The permits under which the pipeline crossings were made recognize and require that the relocation be made at defendants' expense, and, in the opinion of this Court, a reasonable interpretation thereof would also require that such incidental work on adjoining lands as is necessary to accomplish this purpose be effected at defendants' expense."

This same Court had stated earlier in its opinion that the argument that it would be very costly to the permittee to lower its line was not persuasive.

Accordingly, since no reason has been advanced why the Commission should not be a beneficiary of the condition imposed in and for the public interest in the authorization issued by the Department of Public Works, we hold that the defendant, acting in the public interest, required the plaintiff to do no more than what it agreed to do as a pre-condition to obtaining the State's permission to cross Belle Pass and thus owes the plaintiff nothing.

Although not crucial to our decision, we have noted the conditions contained in the permit issued by the Corps of Engineers, relative to the obligations of the permittee should operations by the United States require alterations in the pipeline. In our view the improvement project which required the lowering of plaintiff's line could fairly be termed an "operation of the United States" in light of the substantial federal grant made in aid thereof. This being the case, the defendant might also be considered a beneficiary of the conditions of that permit providing that the permittee bears the expense of required alterations.

The cases cited by plaintiff in support of its claim that defendant's refusal to reimburse it constituted a "taking" without just or adequate compensation are distinguishable.

In Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1091 (1935) a state highway department, purportedly acting under authority of a state statute, sought to construct new highways across a pipeline company's pipeline right-of-way

(which pipeline right-of-way was not located on or across any previously existing highway right-of-way) without compensating the pipeline company. The Court in effect held that this would constitute a taking of private property for public use without compensation in violation of the Fourteenth Amendment. This is a far cry from the situation in the instant case in that plaintiff here sought to cross a previously existing navigable waterway and, as a condition of the permission granted, was required to agree to do just what it was later requested to do. The cited case might control had the Commission attempted to dredge a completely new channel across a right-of-way previously obtained by Tennessee from a private landowner without compensating Tennessee.

Plaintiff also relies on Department of Highways v. United Gas Pipe Line Co., 258 F. 2d 359 (5th Cir., 1958). In that case a permit was issued by the Louisiana Department of Highways to a pipeline company, authorizing construction of a pipeline through a highway right-of-way, on the condition that the permittee make, at its own expense, "such changes, additions, repairs, relocations and removal as may at any time be considered necessary to permit the relocation, reconstruction, widening and maintaining of the highway . . . ." The permit further provided that "the right and privileges granted herein . . . shall not be construed to be any broader than those expressly set out in Acts of the Legislature of the State of Louisiana, regardless of the language used in the permit . . . ." The statute referred to provided that:

"No installation may be made except upon the explicit condition that the owners thereof shall, at no cost to the department, remove or relocate the facility when that is necessary to permit the widening, relocation, or other improvement of the highway . . . ."

The Court, finding that the permit in requiring "additions" was broader than the statute, held that the pipeline company could not be required at its own expense, "to add protective facilities to its pipe line" at a point, located outside of the original highway bed, where a relocated highway intersected the previously existing pipeline.

In the instant case we have been cited to no statute restricting the conditions upon which the Department of Public Works may grant authorization to a pipeline company to cross navigable waters. Hence, we are not confronted with an over-reaching of a statute by a permit. Additionally, we are not involved with a relocation of a waterway (i.e. a new channel) over a previously existing pipeline. Instead, we are confronted only with the widening and deepening of an already existing channel which modifications clearly lie within the scope of the condition to granting of the authorization by the Department of Public Works.

In Arkansas Louisiana Gas Company v. Louisiana Department of Highways, 104 So. 2d 204 (La. App., 1958) the plaintiff pipeline owner claimed reimbursement of the expenses it incurred in complying with the request of the defendant, the Louisiana Department of Highways, that it lower its pipeline over which a new highway, lying adjacent to, but outside of,

the original highway right-of-way, was being constructed. The Court, noting that no claim was being made for the cost of relocating that part of the line which lay within the confines of the original right-of-way, held that the plaintiff was entitled to recover the expense of relocating that section of the line over which the new highway was constructed. This case is distinguishable from the present case for practically the same reason as the United Gas case discussed just above, with the exception that there was no issue regarding a conflict of a permit with a statute.

Finally, Tennessee points to the fact that the Commission obtained a servitude from L. L. & E. in connection with the dredging of Belle Pass, but did not contract with it relative to the lowering of its line in spite of the fact that L. L. & E. specifically declared and reserved Tennessee's right-of-way in granting the servitude in favor of the Commission. Tennessee takes this to be a recognition, in effect, of its rights against the Commission. However, any initial appeal this observation may have vanishes on close inspection. L. L. & E. and Tennessee stand in completely different positions with respect to the Commission and its project. L. L. & E., so far as the record reveals, holds no permits authorizing construction of any facilities across or under the bed of Belle Pass. Consequently, L. L. & E. is not bound by any of the conditions attendant to such a permit relative to modification of any such installation. L. L. & E. is simply a riparian landowner, the rights of which differ vastly with those of

Tennessee, a permittee. We hasten to add, however, that had the Commission sought to dredge a new channel across a pipeline owned by Tennessee, but constructed on a right-of-way obtained from L. L. & E., and had Tennessee not been bound by the conditions of a permit as it was, then Tennessee's rights would have been on a parity with those of L. L. & E. and the result of this litigation would have been different.

The provision that the grant by L. L. & E. to the Commission was subject to the servitude which L. L. & E. granted to Tennessee in 1956, appearing in L. L. & E.'s 1963 grant to the Commission, merely put the Commission on notice that Tennessee, as far as L. L & E. was concerned, had a right to maintain a line in the area covered by the grant to Tennessee and protected L. L. & E. from any claim against it by Tennessee that L. L. & E. violated its contract with Tennessee. The provision relegated Tennessee to whatever rights it may have against the Commission as a result of the latter's use of the privileges granted it by L. L. & E. Beyond putting the Commission on notice of its contract with Tennessee, L. L. & E. washed its hands of the matter. And the conditions imposed in the permit which allowed construction of the line across Bayou Lafourche by Tennessee washed out Tennessee's claim herein against the Commission. Finally, L. L. & E., by putting the Commission on notice that it had a contract with Tennessee, could not create a right in favor of Tennessee against the Commission where, as we hold, none otherwise exists.

Accordingly, it is ordered that judgment be entered in favor of defendant and against plaintiff, dismissing this suit at plaintiff's costs.

This memorandum opinion shall constitute the Court's findings of fact and conclusions of law.

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1 The Department of Public Works of the State of Louisiana is charged with the exercise of all administrative functions of the State in relation to the State's inland waterways (R.S. 38:2 et seq.), subject to the predominant authority and jurisdiction of the United States over such waterways (R.S. 38:3). Additionally, the Department is required to render engineering, economic and other advisory services to port and terminal districts (R.S. 38:2).

2 It is not contended here that such authorization was not needed.

3 Act 222 of 1960; R.S. 34:1651. See the Memorandum Order of this Court, dated August 19, 1968, denying defendant's motion to dismiss.

4 The total cost of the lowering of the line was $54,874.75, according to Tennessee. However, since, by its computation, 35.838% of the affected pipe lay in the channel (248 feet of a total of 692 feet), it billed the Commission for only $35,208.74, conceding that it must itself bear the balance of $19,666.01.

5 See the Memorandum Order of this Court, dated August 19, 1968, denying defendant's motion to dismiss.

Edw. J. Boyle Jr.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana

November 20th, 1968.

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27532

TENNECO, INC.,
Plaintiff-Appellant,

versus

GREATER LAFOURCHE PORT COMMISSION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 1, 1970)

Before WISDOM, SIMPSON, and CLARK, Circuit Judges.

WISDOM, Circuit Judge: In this *Erie*-bound case we construe a condition attached to a Louisiana Department of Public Works permit for a bayou pipeline crossing. We conclude that the condition does not require the pipeline company to pay for alterations occasioned by the state's encroachment on an adjacent easement that the company had purchased from a private party.

I.

In 1955, the State of Louisiana,[1] owner of the beds of navigable streams in the state, LSA-R.S. 9:1101, through the Governor and the Register of the State Land Office, LSA-R.S. 41:1173, sold to Tenneco a right of way for a gas pipeline across the bed of Bayou Lafourche at Belle Pass, in Lafourche Parish, Louisiana. Tenneco then purchased a right of way from Louisiana Land and Exploration Company (LL&E) for a continuation of the pipeline across LL&E's lands adjacent to the bed of the Bayou. On March 15, 1956, the Army Corps of Engineers, having already received notice from the Lafourche Parish Police Jury that that body would interpose no objection to the project, granted the necessary permission for the pipeline to cross the navigable waters of the Bayou. 33 U.S.C. § 403. This permit was subject to the condition "[t]hat if future operations by the United States require an alteration in the position of the structure or work herein authorized", the owner, Tenneco, would remove or alter the structure "without expense to the United States". The Louisiana Department of Public Works, by letter dated February 1, 1956, stated that it had no objection to the proposed

[1]The Department of Public Works of the State of Louisiana is charged with the exercise of all administrative functions of the State in relation to the State's inland waterways (LSA-R. S. 38:2 et seq), subject to the dominant authority and jurisdiction of the United States over such waterways (LSA-R.S. 38:3). Additionally, the Department is required to render engineering, economic and other advisory services to port and terminal districts (LSA-R.S. 38:2).

crossing.[2] The final paragraph of that letter contained the following language:

> Should changes in the locations or sections of the existing channels, or in the generally prevailing conditions in the vicinity, be required in the future, in the public interest, the applicant shall make such changes in the project concerned, or in the arrangement thereof, as may be necessary to satisfactorily meet the situation, and shall bear the cost thereof.[3]

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[2]The district court stated that Tenneco had sought the Public Works permit. That specific issue, however, does not appear to have been litigated below. During oral argument on appeal, counsel for Tenneco explicitly denied having applied for the permit and maintained that the Army Corps of Engineers must have forwarded its application to Public Works. The letter from Public Works does begin, "[t]his office is in receipt of a *copy* of your letter *addressed to the District Engineer, Corps of Engineers, New Orleans District*" (emphasis supplied). Because of the view we take of the case, however, we do not find this issue pertinent.

[3]Since the controversy hinges largely on this letter, we quote it here in full:

> Gentlemen:
>
> This office is in receipt of a copy of your letter addressed to the District Engineer, Corps of Engineers, New Orleans District, dated January 20, 1956, together with drawings showing proposed Natural Gas Pipe Line crossings under Belle Pass and canals near Leeville, Lafourche Parish, Louisiana.
>
> The above request has been examined by Mr. Thurman C. Morgan, District Engineer for this Department, and no objection is offered to the proposed crossings, provided that they are constructed in accordance with the above mentioned letter and drawings, and provided also that pipe line is installed under Panama Canal to accommodate a - 10.0 M.S.L. channel 100 feet wide; and under Belle Pass to accommodate a - 13.0 M.S.L. channel 125 feet wide. Pipe line to be a mini-

Tenneco proceeded to build its pipeline across LL&E's property and across (under) the bed of the Bayou.

In 1962, the Greater Lafourche Port Commission[4] decided to widen and deepen the channel of Bayou Lafourche at Bell Pass as part of a new port facility.[5] The federal government promised and later supplied funds in aid of the project. Since the proposed widening would extend the channel onto LL&E's property, the Port Commission obtained an easement from LL&E subject to existing servitudes including Tenneco's right of way. On the Port Commission's demand, Tenneco lowered its pipeline through both the original channel of the Bayou and that part of the new channel which the Port Commission had dredged on LL&E's property. But Tenneco reserved its rights to seek compensation. Tenneco now demands from the Port Commission $35,208.74, the cost of lowering its pipeline on the LL&E property, outside the right of way it had purchased from the State. The district court denied relief, *Tennessee Gas Transmission Co. v. Greater*

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mum of 3 feet below channel bottom.
Should changes in the locations or sections of the existing channels, or in the generally prevailing conditions in the vicinity, be required in the future, in the public interest, the applicant shall make such changes in the project concerned, or in the arrangement thereof, as may be necessary to satisfactorily meet the situation, and shall bear the cost thereof.

Yours very truly,
/s/ Hu B. Myers
HU B. MYERS
Chief Engineer

[4]Established by statute in 1960, LSA-R.S. 34:1651.

[5]The parties have stipulated that the new port facility is "in the public interest".

Lafourche Port Commission, E.D. La. 1968, 293 F. Supp. 1019, and Tenneco appeals.

Tenneco contends that the Public Works letter does not require it to pay the cost of lowering its pipeline outside the original bed of the bayou, and that if it did, the requirement would be expropriation without just compensation. An amicus brief filed by several oil producers and pipeline owners and operators further stresses the constitutional argument. United Gas Pipe Line Company, appearing separately as amicus curiae, maintains that the Department of Public Works had no authority to issue its letter and that the letter's effect can be only advisory. The Port Commission, on the other hand, argues that Tenneco must bear the total cost involved under either the Public Works permit or the condition specified by the Army Corps of Engineers. Because we conclude that a proper construction of the Public Works permit limits its effect to the area within the right of way granted, we need not reach either the constitutional issue or the issue relating to the authority of Public Works. Nor do we find in this case that the Corps's conditions inure to the Port Commission's benefit.

II.

It is useful, first, to clarify the subject of dispute. Tenneco agrees that it is financially responsible for pipeline alterations necessary to accommodate changes in the channel that are made within the right of way it purchased from the State — that is, changes within the bayou's original boundaries. Tenneco objects, how-

ever, to paying for those changes occasioned by the channel's encroachment onto LL&E's property and onto Tenneco's easement there. . .

The pertinent section of the letter from Public Works allocated to Tenneco responsibility for making, at its expense, "changes in the project concerned, or in the arrangement thereof". The significance of this responsibility must turn, therefore, on the scope of that phrase.

The record before us does not contain Tenneco's January 20, 1956, application to the Army Corps of Engineers, to which the letter from Public Works was a response.[6] But the permit issued by the Corps discloses that Tenneco sought permission to "install and maintain a 6-inch gas pipe line under and across Belle Pass (Bayou Lafourche) . . . ." Indeed, according to the permit, the Corps had authority only to express "the assent of the Federal Government so far as concerns the public rights of navigation". Thus, Tenneco's application to the Corps and the request before Public Works was not for general permission to construct a pipeline nor even for authorization of that portion of the pipeline on LL&E property adjacent to the bayou, but specifically for authorization of that portion which would cross the navigable waters and bed of the bayou as it then existed. The first two paragraphs of Public Works's responding letter are entirely consistent with this interpretation. Public Works examined Tenneco's "request" to construct "Natural Gas Pipe Line *cross-*

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[6] See paragraph 1 of the letter, note 3 *supra*.

ings" (emphasis supplied). It informed Tenneco that "no objection is offered to the proposed *crossings* . . ." (emphasis supplied).

Looking at "the project concerned" of the third paragraph, then in the light of its antecedents in the preceding paragraphs, we find no indication that the letter assigned liability for anything more than future changes in the subject matter of the application — namely, the crossing of the current width of the bayou. This interpretation is consistent with the fact that the framework of consideration was that portion of the pipeline which would cross the bayou as it stood in 1956. The language is not sufficiently explicit to justify extending it to include under "the project concerned" sections of the pipeline which might come within future boundaries of the bayou. Traditionally, in choosing among reasonable meanings of an agreement "an interpretation is preferred which operates more strongly against the party from whom [the words] proceed". Restatement of Contracts § 236(d) (1932). See also Restatement (Second) of Contracts § 232 (Tent. Draft No. , 19); L. Simpson, Handbook of the Law of Contracts § 102(2d ed. 1965).

Current Louisiana treatment of right of way grants reinforces our reading. The State Land Office requires "permission or clearance" from Public Works only if the "proposed line crosses navigable waters". State of Louisiana, Granting of Rights-of-Way to Corporations or Individuals Rule 7 (1969). A condition analogous to that in Public Works' letter is now incorporated in the right of way grant itself. The boilerplate refers to

widening or deepening the streams or water bottoms "*within the right of way herein granted*" (emphasis supplied). Principal responsibility is imposed upon the grantee only for alterations or relocation resulting from "such work." Changes outside the right of way granted, like those involved here, are not mentioned.

The only Louisiana case authority in point further buttresses our conclusion. In *Arkansas Louisiana Gas Co. v. Louisiana Department of Highways*, 104 So.2d 204 (La.App. 1958), *writ denied*, the Louisiana Second Circuit dealt with a statutory provision instituting conditions similar to the arrangement here. The statute said:

> No [pipeline] installation may be made except upon the explicit condition that the owner thereof shall, at no cost to the department, remove or relocate the facility when that is necessary to permit the widening, relocation, or other improvement of the highway, when so ordered by the director.

104 So.2d at 209. The Louisiana court interpreted this provision narrowly. It concluded that the pipeline company had satisfied the condition once it had "borne the cost of compliance with defendant's regulations *within the right-of-way which its facility crossed under the authority of the* [*original*] *permit from the Louisiana Highway Commission*". *Id.* at 210. (emphasis supplied). The pipeline company was not required to pay for relocation outside the area covered by the original permit.

By reaching this construction of the letter, we avoid adjudication of the constitutional issue. *See Haynes v. United States*, 1968, 390 U.S. 85, 92, 88 S.Ct. 722, 19 L.Ed. 2d 923, 929; *Ashwander v. Tennessee Valley Authority*, 1936, 297 U.S. 288, 348, 56 S.Ct. 466, 80 L.Ed. 688, 711 (Brandeis, J., dissenting in part). We recognize of course that the surrender of property rights may be consideration for the grant of something else and that the state police power supports the restriction of some private rights. *See, e.g., Edgar A. Levy Leasing Co. v. Siegel*, 1922, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595. But Tenneco paid the Governor and State Land Office for its right of way across the bayou. No indication was given in the grant that more consideration might be necessary. Although Public Works may have had regulatory authority[7] to warn Tenneco that its pipeline crossing was permissible in 1956 but might not be in the future, we think there is at least a question whether it could constitutionally require that Tenneco also surrender without compensation rights over adjacent private property. *Cf. Panhandle Eastern Pipe Line Co. v. State Highway Commission*, 1935, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090.

We quickly dispose of the Port Commission's contention that the conditions in the Army Corps permit redound to its benefit. Condition (f) of the permit refers to an "alteration in the position of the structure or

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[7]We say "may have had" because United Gas, as amicus, contests Public Works's authority to do anything but advise the Governor and Register of State Lands at the time of the sale of a right of way. Tenneco, however, seems to admit Public Works's authority at least to the extent of the original boundaries of the bayou. We find it unnecessary to decide the issue.

work *herein authorized*" (emphasis supplied).[8] As we have already pointed out, the Corp's permit did not authorize that portion of the pipeline on the LL&E property, for no such authorization was required. We find this condition of the permit inapplicable, therefore, without considering other troublesome obstacles the Port Commission must surmount to show that it is entitled to this benefit.[9] We do not read *United States v. 597.75 Acres of Land*, W.D. La. 1965, 241 F. Supp. 796, as necessarily inconsistent with our result. There the district court held simply that an Army permit's imposition of the cost of altering a pipeline within a river bed included "incidental" changes outside the river

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[8]The condition states:

> [f] That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed . . . .

[9]For example, the Army Corps permit requires only that the work be done "without expense to the United States". Thus the Port Commission must argue that its expense amounted to an expense of the United States because the federal government supplied part of its funds. Similarly, the condition refers to "operations by the United States". The Port Commission must therefore argue that because it received federal funding, its activities are operations of the United States.

In its brief on appeal, the Port Commission does not rely on another condition of the Army Corps permit mentioned by the court below, "[t]hat if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee". The condition does not appear applicable to the problem here.

bed — in other words, changes the pipeline company must make "necessary to accomplish [the] purpose" of relocation *within* the river bed. *Id.* at 799. The district court retained jurisdiction to ensure that the Government did not further encroach on private rights.

Since the parties have not argued the question of what reimbursement is appropriate, we express no view on that question.

REVERSED and REMANDED for disposition consistent with this opinion.